

Greg Craig's Remarks: ACS Conference on the Pardon

I want to thank the American Constitutional Society and the Open Society Initiative for sponsoring this conference and for calling attention to this important question. I thought the panel discussion that you just held was terrific.

In addition to Margy Love who has devoted her entire professional life to the cause of pardon reform, there are two other people who deserve special tribute for the work they have done on this issue.

Dafna Linzer deserves a Pulitzer Prize for her reporting on the way the pardon power has withered away and how disparate it has been applied in the past. Without her work, this important issue would not receive the attention it deserves and has finally gotten.

Governor Bob Ehrlich deserves a Profile in Courage Award. Without his record in office, we would have no example, no model to look up to. Governor Ehrlich demonstrated that a responsible and robust exercise of the governor's powers to pardon and to reprieve is actually part of a governor's duties, and one of his responsibilities in office.

The fact that Bob Ehrlich is a conservative Republican makes his example even more important. The politics of law-and-order is easy, and both Republicans and Democrats have banged that drum relentlessly – sometimes with truly terrible

consequences for our system of justice and for the rule of law. Whether you are a Democrat or a Republican, it takes courage for a sitting politician to be willing to open yourself up or be vulnerable to the charge of being "soft on crime," a risk that inevitably attends every exercise of leniency and mercy, no matter how justified or warranted that exercise might be.

To begin with, it is shocking that so few people receive pardons or commutations. That they are so rare today is a problem in and of itself, because there are many more people who need relief, who are qualified for relief and who should receive the kind of relief contemplated by our Founding Fathers. But it is the disparity in the application of this power that is to me the most troubling. The facts are clear. There is great disparity in those who receive pardons – white vs. black, rich vs. poor. Perhaps even more troubling is the indefensible disparity in the application of the power to comparable or parallel cases -- the disparate treatment of citizens in similar situations. It is indefensible for Citizen A to receive a pardon for what he has done when Citizen B did something far less serious and was denied a pardon. This problem gives rise to suspicions of cronyism and corruption. Just like the establishing the Sentencing Guidelines was an effort to bring some kind of uniformity to sentencing, there should be some effort to bring some kind of coherence and consistency to the granting of pardons.

I have four things to say, and I don't think any of them will be very controversial to this crowd:

(1) The power that is given to the President in Article 2 of the Constitution to "grant Reprieves and Pardons for Offenses against the United States" is as important today as it was 223 years ago when the Constitution was ratified and when

Alexander Hamilton wrote Federalist 74. We should look at this important component of presidential power not only as something that enables the Chief Executive to mete out justice unilaterally and individually, but also as a duty. A President's performance in office should not only be measured by the economy and by the state of the world and whether we are at war or peace, but also by whether he has been responsible in the exercise of this important constitutional power. It is more than a power. It is a duty and an obligation.

(2) In my view, we cannot improve or strengthen the exercise of this power without taking it out of the Department of Justice. There is, in DOJ, an institutional interest in preserving convictions and in preserving sentences. The Pardon Office was created in 1893, and when it was created, it was located in the heart of the Justice Department. At the very least, there is a perception problem here. The DOJ is not perceived to be a neutral forum. The DOJ is not the place and federal prosecutors are not the people seen as being reliable or impartial advisors to the President in the exercise of this function. Whether there is something more than a perception problem is a judgment that I am not qualified to make, but I do know that – for Republican President as well as Democratic Presidents – the Pardon Office has not been successful in achieving what it was designed to do.

(3) We cannot improve or strengthen the exercise of this power without taking it out of politics as much as possible. So in pursuing reform, we must have Republicans involved as well as Democrats, the Federalist Society as well as the Constitutional Society. I have long been a proponent of the President creating a special blue-ribbon commission to review the issue and to make recommendations. That is the path to reform. I have also long been a proponent of creating a special

agency of perhaps an independent commission led by a panel of distinguished commissioners who are both Republicans and Democrats and who have a large enough staff to do the work that is needed. That is the path to recovery.

(4) Here is my final point. The executive's power to commute sentences is every bit as important as the power to grant pardons. This takes more courage because – where granting a pardon usually involves a person who has served his or her time, someone who has otherwise lived an exemplary life, someone who only wants to put the bad old life behind and remove the legal burdens of a felony conviction -- commuting a sentence necessarily involves reducing a punishment, giving a lighter sentence to someone who has been convicted of a crime and is currently serving a prison term. This is not easy for a sitting politician to do. But everyone who is familiar with the system – whether it is Chief Justice Rehnquist or your local magistrate – everyone familiar with the system knows that there is a crying need for a more pervasive, more thoughtful, more robust exercise of the power to commute sentences by the Chief Executive. We need more strength, more courage, more action. We all know that there are literally thousands of individuals – people who have been given lengthy sentences for non-violent first offences – who will not be released for many, many years but who *should* be released because the sentences they received were so disproportional to the crime. We all know that there is today a well-defined category of offenders whose sentences should be carefully scrutinized and perhaps modified for no reason other than there was an incredibly harsh disparity in sentencing that they have experienced, that there was a great unfairness in the way the system treated two very similar if not identical courses of conduct.

And so I leave you today with one last thought. We will never fill the Rose Bowl with thousands of people prepared to march, speak and fight for pardon reform. But we can make a difference if we focus our efforts and reach across the aisle. I will leave you with words that have been uttered by as disparate a group of national leaders as one might ever imagine but these words apply to our situation today. This is what Ronald Reagan once said as did – at one time in their political careers -- George Romney, Robert F. Kennedy and most recently Barack Obama:

"If not now, when. If not us, who."

Thank you.